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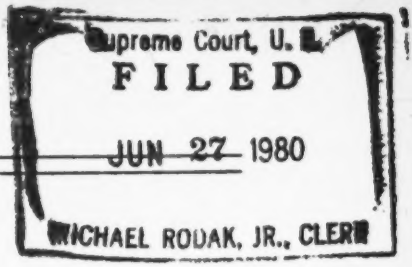

IN THE SUPREME COURT

OF THE UNITED STATES

October Term 1980

No. [redacted]

BERT M. BUTLER,

Petitioner,

v.

THE UNITED STATES,

Respondent.

PETITION FOR A WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF CLAIMS

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BERT M. BUTLER,

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THE UNITED STATES,

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PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF CLAIMS

Petitioner, Bert M. Butler, respectfully prays that a Writ of Certiorari issue to review the opinion and judgment of the United States Court of Claims entered in this proceeding on February 1, 1980.

CITATIONS TO OPINIONS BELOW

The opinion of the United States Court of Claims, as yet unreported, appears in the Index to this petition. The opinion of the ENGBCA also appears in the Appendix to this petition.

JURISDICTION

The Order and Judgment of the United States Court of Claims was entered on February 1, 1980, which rehearing was denied on March 28, 1980. This Petition for Certiorari was filed within the period of time prescribed by 28 U.S.C. ¶2101(C). The jurisdiction of this Court is invoked under 28 U.S.C. §1255(1).

QUESTIONS PRESENTED

(1) Has the Court of Claims erroneously decided a substantial question of Federal Contract Law not yet considered by this Court in holding that the mandatory administrative proceedings are completed before the contracting officer has made a determination on the contractor's account?

(2) Did the Court of Claims erroneously fail to decide a substantial question of Federal Contract Law not yet considered by this Court in ignoring contractor's issue that until contracting officer makes a determination on contractor's statement of account, contractor cannot seek mandatory arbitration?

(3) Has the Court of Claims erred in deciding a substantial question of Federal Contract Law, which should be decided by this Court, in determining that contrator's statements of account were litigated in the Board's December 1966 decision, when the Board failed or refused to consider contractor's statements of account in that decision?

(4) Did the Court of Claims erroneously answer a substantial question of Federal Contract Law not yet considered by this Court in holding that, without contractor's consent, the surety could bind the contractor as to material

changes outside the contract for extra work?

(5) Did the Court of Claims erroneously decide a substantial question of Federal Contract Law not yet considered by this Court in refusing to grant a rehearing, or a new trial, when the administrative record was incomplete, and improperly authenticated by the government as complete, with evidence vital to Petitioner's theory omitted, including the chronology of claims, the contracting officer's determination, and the contractor's notice of appeal, thereby misleading the Court to an erroneous analyses of facts?

(6) Did the Findings of Fact of the ENG BCA so materially deviate from the accepted and usual course of administrative proceedings as to amount to a denial to this contractor of due process of law as to justify an exercise of this Court's supervisory powers?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

AMENDMENT V:

" . . . No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." (Proposed by Congress in 1789 and ratified by the necessary number of states in 1791)

WUNDERLICH ACT:

SECTION 321. LIMITATION ON PLEADING FINALITY OF DECISIONS - STANDARDS OF REVIEW "No provision of any contract entered into by the United States, relating to the finality or conclusiveness of any decision of the

head of any department or agency or his duly authorized representative or board in a dispute involving a question arising under such contract, shall be pleaded in any suit now filed or to be filed as limiting judicial review of any such decision to cases where fraud by such official or his said representative or board is alleged: Provided, however, That any such decision shall be final and conclusive unless the same is fraudulent or capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith, or is not supported by substantial evidence.: (May 11, 1954, c. 199, par. 1, 68 Stat. 81.)

SECTION 322. FINALITY OF DECISIONS NOT A MATTER OF CONTRACT
"No Government contract shall contain a provision making final on a question of law the decision of any administrative official, representative or board. (May 11, 1954, c. 199, par. 2, 68 Stat. 81.)

STATEMENT OF THE CASE

Plaintiff entered into a contract with the United States Army Corps of Engineers, Portland District, for clearing work and excavating the levee slope. There was to ba a 12 inch thick special gravel material delivered on the levee slope and a 24 inch thick quarry rock blanket delivered to be placed on top of the gravel to stop the erosion from the levee slope. The work was ordered from the Flood Control Act, the law that directs for the river bank slope to be maintained and repaired. The repair work was on Sauvie Island across from Portland, Oregon on the Willamette River at the upstream end of the island and at the downstream end of the island where

the Willamette River flows into the Columbia called Morgan Location. The notice to proceed was August 23, 1962 that allowed ten days to mobilize and start work and to be completed in ninety days by 21 November 1962.

The contract drawings were approved for bidding on May 3, 1962. The bid invitation was on July 6, 1962. Butler was lowest bidder by $125. on the four work item contract, that was accepted on August 6, 1962 in the amount of $77,696. The clearing, excavation and grading work amounted to $21,260 and the gravel and rock blanket materials amounted to $56,436 or about 75% of the cost of the contracted work. The contract was misrepresented to the contractors to bid on. The contract was based upon obsolete and faulty drawings and specifications; drawings CLW 99-45 (Morgan) and CLW 99-46 (Loop) that had two more years of flood water damages among other things than was shown on the drawings. The contract special conditions indicated revision dates June 26, 1962, however, this was misleading. The excavation and filling work acquired because of erosion were based upon the 1960 survey. The government was to provide the layout stakes and the survey for the original and final compilations which they did on July 24, 1962. Therefore the government had superior knowledge that the drawings misrepresented the work that was to be done. The government's drawings showed more excavation that could be used for fill material in excavation above the grade of the levee slope than there was by 1962, and the drawings understated the hole to be filled on the levee slope (embankment). The net shortage totalled 19,532 cubic yards of material which did not exist near the project before the levee slope could be

rebuilt to receive the rock blanket materials. This fact was concealed by the government who offered testimony contending the material was missing because of the contractor's negligence; when in fact, the government's layout stake survey provided July 24, 1962, one month before the notice to proceed informed the contracting officer Col O Bradovich of the deficiency of native materials and the cardinal change in the contract work.

The true engineering data was concealed and misrepresented until June 5, 1967 and not revealed for the Board to be informed about until there was a preconference meeting Nov. 11, 1971.

Butler had substantially completed all work he was to perform by the contract by the end of the first work month by Sept. 30, 1962. Bid items land 2 (clearing and excavation) were completed except for the areas where the contracting officer had failed to provide modified drawings, specifications and failed to acquire the access road to the Morgan Location. The last two contract items 3 and 4 (the gravel and rock blanket materials) were already manufactured at the two Portland Rock Companies pla nts. The materials were not delivered because of the changed conditions after there had been two more years of river erosion damages. The contracting officer would not admit to the added erosion and would not issue the necessary change required from the faulty drawings and specifications, until Nov. 29, 1962. There was extremely abnormal weather that permeated into all of the levee materials with excess water content. From the end of September through November 29, 1962 it was impossible for the contractor to make any progress toward reconstruction of the levee slope because

the land had washed away from where the gravel blanket materials were to be placed. That was caused by two more years of the Columbia River annual June flood water periods. The contracting officer ignored the contract provision that provided for a supplemental contract. There was a change order required in September to negotiate for the delivery of rock borrow materials, which was pursuant to the contract Technical Provision 4-01.

The contracting officer was obnoxious to the contract. He concealed and misrepresented the true engineering and quantities required for filling the levee slope. He used the false drawings to impede the contractor's progress and misrepresented that there was useable materials to fill and grade the levee slope. He was misrepresenting that the contract was possible of performance in the ninety day period, when the contractor provided detailed facts starting on Oct. 18, 1962 in protesting that the contract was impossible of performance.

By using the false drawings among other things the contracting officer terminated the contract that was made from the false drawings. It was covered up that the contractor was working from a change order directed Nov. 29, 1962. Contractor Butler protested and filed a timely appeal, (ENBCA) 2475 and submitted his billing for work and labor furnished the rock materials that he had delivered and for the change order, rock work that was in the amount of $44,749.84.

The contracting officer refused to allow Butler to participate after Dec. 15, 1962 on any phase of the contract. The contracting officer and the surety company rebid the contract from the obsolete, false drawings. The low bidder negotiated the re-let contract

as a defaulted bond contract novation specie contract. None of the work was shown on the original drawings except the two rock blanket materials that were labeled items 3 and 4 on Butler's contract that amounted to $56,436. And there was no land to place the rock blanket materials on until rock could be delivered from a rock quarry to rebuild the levee slope. The rock borrow was negotiated by the re-let contract by being alleged that the subgrade rock from borrow was a breach of contract damage item against Butler for 10,295 cubic yards of rock @ 3.28 per cubic yard, $33,767.60. Because the false two year old drawings did not show that borrow materials were required before the items 3 and 4, $56,436 rock blanket materials could be started to be delivered on the levee slope. Thereby the re-let contract was negotiated from the false drawings as a defaulted bond contract by an express contract with Heintze Construction Co. for $97,737.60. That was claimed by the contracting officer to have been performed from January to March 21, 1963 that was appealed and a hearing provided Feb. 11, 1964 docketed as ENGBCA 2475. The Board ruled that the ninety day period had not expired. That there were excusable delays for 18 days of abnormally extreme weather in October and the same for 27 days in November. And that an additional 17 days were preserved for change condition work required for working on the subgrade which is a total of 62 days that the Board ruled was preserved on contractor Butler's contract. It was impossible to reconstruct the levee slope from the drawings and specifications negotiated with Butler. The contracting officer changed the drawings and specifications for the successor contractor to perform from after the contract was re-let on Jan. 4, 1963 as a defaulted bond contract negotiation that,

Butler was not aware of. In the hearing BCA 2475 the Board ignored and failed to consider contractor Butler's statement of account. The billing included Butler's November estimate and the December 1962 estimate and ten percent retainage that was withheld for security to apply to any breach of contract damages. The government Attorney, Mr. Clifford Comisky, pleaded that the contractor's billing of $44,749.84 could not be ruled on by the Board when the contracting officer had failed to make a contracting officer's determination on the Butler account after Butler was paid $12,506.40 on October 25, 1962. The Board determined that the contracting officer's ex parte termination was proper. Because the Board hypothesized that if the drawings and specifications had been changed for Butler that he would not have completed by change orders timely enough.

The government filed a breach of contract damages case against the contractor. The contracting officer abolished the Jan. 4, 1963 alleged bond default contract on Jan. 24, 1963. There were new drawings and specifications furnished and the contract was changed to perform $129,344.86. for more materials and work than was possible of performance from the original drawings. The Board determined that there was over $50,000 worth or more subgrade fill material and work required that was required by change orders that was not chargeable to Butler. The Board would not make an adjudication after it was evident that the re-let contract negotiated for $97,737.60 on Jan. 4, 1963 was from a false drawing that was used for a fraud termination on Dec. 15, 1962. The Board referenced the matter back to the contracting officer

to conspire further against the contractor and to improvise a contract after there had been two different contracts negotiated from different drawings and specifications and the original contract had been impossible of performance. The contracting officer substituted an improvised statement that was not calculated from the official drawings and specifications. Then by random, he picked units of work to invent a false damage charge against contractor Butler.

The contracting officer falsified that the original drawings showed that there was $83,013.75 worth of work that Butler could have completed the project by performing the work in the 90 day period. Then the improvised items of work added to $7,275 more than that amount that was falsified to be the excess damages cost that Butler caused. Then after the Board in the first hearing ruled that Butler had 62 days still preserved on his contract when he was terminated. In contravention the contracting officer charged Butler for delaying the project from being performed for 48 days of liquidated damages of $4,800 and six percent interest. Unknown to the contractor the contracting officer and surety covertly and clandestinely took from Butler's posted funds $13,081 and paid the government by pretense of fraud that the contractor defaulted on the contract. That the repair work was completed from the original drawings by a re-let bond default contract. Butler engaged a new lawyer, Mr. Wilbur Wilson, and timely appealed the attempted settlement by a stranger who had no rights to Butler's contract. As Butler had his contract negotiated from the false two year old drawings that he performed without any obligation and without any action that he did not successfully defend from.

The fourth appeal by Butler dated June 9, 1967 docketed ENGBCA 2991 limits its application

only to the claim as summarized and attached to the Complaint in ENGBCA 2475, filed originally January 10, 1963, which have never been acted upon by the contracting officer. The claim assembly was ordered to be heard by the Superior Officer and competent authority of theNorth Pacific Division Office, General Roy Kelley, which he forwarded for hearing on the account matter dispute was registered and docketed as ENGBCA 2991 on October 28, 1969. The government attorney, Mr. Comisky, in the first part of November asked for a postponement and among other delays through no fault of Butler's the Account Hearing for Arbitration was delayed for hearing to March 1972. Then the Board refused to hold the hearing after the Superior authority of the General had recovered the true engineering and revealed that the drawings provided to Butler were false drawings and they were impossible of performing from to complete the contract in 90 days. Thereby the contractors time accrued on or about March 13, 1972 to file for due process of law from a competent court of jurisdiction for a settlement of account. The contractor had two appeals docketed with the Appeal Board to about the middle of March 1972, when the Appeal Board refused to provide the hearing from the new found evidence that was uncovered after having the first two Appeal Board hearings.

The Court of Claims decided Feb. 1, 1980 that any claims plaintiff had should have been litigated in the Board's December 1966 case, that was determined by the contracting officer and appealed by Butler timely on January 26, 1967, but it was secretly removed and concealed from the administrative file. From the event the Court of Claims determined that plaintiff's petition was filed more than six years beyond

the time his cause of action accrued and the contractor action for payment was barred. Plaintiff's motion for rehearing was based upon an incomplete administrative record that was improperly authenticated by the government as complete. Evidence vital to the plaintiff's theory was omitted including the chronology of claims and the contracting officer's determination, misleading the court into an erroneous an analyses of facts and its Order is incorrect as a matter of law and should be reversed upon rehearing.

The decision of the Court of Claims was based upon an administrative record that was either fraudulent or erroneously incomplete. Concurrently with the filing of the Motion for Rehearing, plaintiff moved to supplement the administrative record to add copies of the removed transcript on hearings in BCA Nos. 2475 and 2727, and the exhibits, the official estimate account statements and correspondence which was omitted from the record. On March 28, 1980 the Court of Claums denied plaintiff's Motion to Supplement the Administrative Record and Motion for Rehearing and granted defendant's motion to permanently withdraw the administrative record.

REASONS FOR ALLOWANCE OF THE WRIT

Butler has been denied due process of law by the failure of the Court of Claim to provide a judicial determination of the contractor's account.

ENGBCA decisions Nos. 2475 and 2727 implicitly found that the original contract drawings and specifications were impossible to be performed.

The government then wrongfully terminated the contract. By its failure to provide accurate drawings and specifications, and the needed change orders, the government substantially breached its contractural obligations, and in such a way as to prevent plaintiff's performance. The contracting officer, therefore, was without jurisdiction to terminate the contractor for default in the first instanct.

In this case, plaintiff's failure to perform, "is due to causes beyond the control and without the fault or negligence of contractor." The notice shall be deemed to have been issued pursuant to the clause entitled, "termination for convenience of the government."

The contractor was required to submit his statement of account to the contracting officer for determination. This was done by the contractor on January 10, 1963. The administrative procedure provided for a contracting officer's determination of the statement of account. The contracting officer failed or refused to make this determination; hence, in both BCA 2475 and BCA 2727, the Board made no determination of the contractor's claims.

The exchange of letters between the surety and the contracting officer states it

is a final settlement of the government's claim against the bond executed by the surety arising out of Butler's default. Even if Butler had agreed to that settlement by signing those letters, the settlement would not affect any rights or claims he had against the government not determined by the ENGBCA. The Surety was a stranger to the Butler contract.

Similarly, it appears clear, without Butler's consent, the surety could not bind Butler as to claims outside the contract for extra work, or which might reverse the assessment of excess costs. Butler's denial of such consent by letter dated January 23, 1967 in conjunction with no evidence to the contrary establishes the lack of that necessary consent.

Plaintiff did whatever was necessary to protect his rights of appeal. It must be observed that it was the government that determined that the disputes hearing would be heard in segments. The contractor was bound to a mandatory arbitration procedure by the contract disputes clause.

The appeal file shows that Butler notified the contracting officer on December 15, 1962, the date his right to proceed was terminated, that directed removal of certain unsuitable embankment material and replacement with quarry run rock he began on December 8, 1962 would be extra; that on January 10, 1963, at the same time he delivered his appeal from the default termination, he delivered an undated letter setting forth his statement of account. The government's answer asserted that the Board was without jurisdiction because there has been no decision on the merits by the contracting officer on the claim.

Neither ENGBCA 2475 nor ENGBCA 2727 expressly determined or directly considered that claim. ENGBCA 2475 only determined the propriety of the default termination. ENGBCA 2727 only determined the excess costs due to that default. In arriving at these determinations the Board may have decided facts controlling on this claim, but a review does not disclose any such consideration. Butler, under the contract, the facts and the law, was entitled to a decision on the merits and quantum of his claim.

The Court of Claims ignored the fact that their Order and Judgment of February 1, 1980 was based upon an incomplete administrative record that was improperly authenticated by the government as complete; evidence vital to plaintiff's theory was omitted, and the Court was misled into an erroneous analyses of facts.

The Court of Claims erroneously determined that the mandatory administrative proceedings were completed before any determination had been made on the contractor's account, thereby depriving the contractor of a judicial determination on his account, and denying plaintiff due process of law for settlement of his account.

CONCLUSION

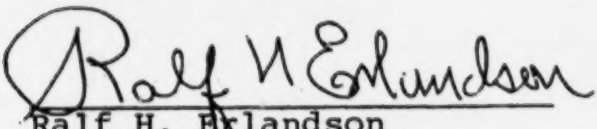
Petitioner has shown that the Court of Claims has proceeded illegally, and its Order is incorrect as a matter of law; that the proceedings are infected with fatal irregularities rendering them absolutely void.

For these reasons, a Writ of Certiorari should issue to review the judgment and opinion

of the United States Court of Claims.

June 24, 1980.

Respectfully submitted,



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IN THE UNITED STATES COURT OF CLAIMS

No. 82-78

BERT M. BUTLER	)	
	)	Contract; statute of limitations;
v.	)	accrual of cause of action.
	)	
UNITED STATES	)	

Ralf H. Erlandson, attorney of record for plaintiff.

Ray Goddard, with whom was Assistant Attorney General Alice Daniel, for defendant.

FEB 1 - 1980

Before KASHIWA, Judge, Presiding, KUNZIG and BENNETT, Judges.

O R D E R

Plaintiff had a contract with defendant for construction of bank protection works along the Willamette and Columbia Rivers in Oregon. Defendant's contracting officer terminated plaintiff in 1962 for insufficient progress. Subsequently, plaintiff sought and received administrative review. Eventually, in 1978, plaintiff filed suit in this court. This case is before us on cross-motions for summary judgment.

Defendant argues that plaintiff's claims are barred by the 6-year statute of limitations. 28 U.S.C. § 2501 (1976). After the contracting officer terminated his contract, plaintiff appealed the decision of the contracting officer to the Army Corps of Engineers Board of Contract Appeals. 41 U.S.C. § 321-22 (1976). It affirmed the contracting officer as to termination for default on

July 16, 1964. Subsequently, the Board considered the contracting officer's decision in regard to reprocurement costs and liquidated damages. It remanded the case as to liquidated damages on December 7, 1966. Thereafter, in January 1967, plaintiff's surety settled with defendant and paid all reprocurement costs, liquidated damages and interest.

In 1968, plaintiff filed 10 new claims that the Board eventually considered barred by its previous decisions. After the Board rendered that decision and later denied rehearing, plaintiff filed suit here on March 8, 1978.

The statute of limitations begins to run, as a general rule, when plaintiff's claims first accrue. Brownfield v. United States, 218 Ct. Cl. ___, 589 F.2d 1035 (1978). In disputes clause cases, the claim first accrues when the mandatory administrative proceedings are completed. Crown Coat Front Co. v. United States, 386 U.S. 503 (1967); Nager Electric Co. v. United States, 177 Ct. Cl. 234, 368 F.2d 847 (1966). Any claims plaintiff had should have been litigated in the Board's December 1966 case settled in January 1967. While plaintiff argues that his remedies were not exhausted until a decision was made by the Board on his 1968 claims, there is no indication that those claims could not have been presented earlier. Thus, plaintiff's claims accrued when its claims were settled in January 1967. Brownfield v. United States, supra, 589 F.2d at 1039; Midgett v. United States, 221 Ct. Cl. ___, 603 F.2d 835 (1979). Since plaintiff filed more than 6 years beyond the time its cause of action accrued, suit here is barred. 28 U.S.C. § 2501 (1976).

Accordingly, IT IS ORDERED upon consideration of the parties' submissions and after oral argument, that defendant's motion for summary judgment is granted and plaintiff's cross-motion for summary judgment is denied. The petition is dismissed.

BY THE COURT

FEB 1 - 1980

Shiro Kashiwa
Judge, Presiding

IN THE UNITED STATES COURT OF CLAIMS

No. 82-78

BERT M. BUTLER

v.

THE UNITED STATES

Before KASHIWA, Judge, Presiding, KUNZIG and BENNETT, Judges.

ORDER

This case comes before the court on defendant's motion, filed February 5, 1980, to permanently withdraw the administrative board record, plaintiff's motion, filed February 19, 1980, for supplementing the administrative record and plaintiff's motion, filed February 19, 1980, pursuant to Rule 151(b), for rehearing with reference to the order entered herein on February 1, 1980, dismissing plaintiff's petition. Upon consideration thereof, together with the responses in opposition thereto, without oral argument,

IT IS ORDERED that plaintiff's said motions to supplement the administrative record and for rehearing be and the same are denied and that defendant's said motion to permanently withdraw the administrative record is granted.

BY THE COURT

MAR 28 1980

Shiro Kashiwa
Judge, Presiding